INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	4
Conclusion	9

CITATIONS

Cases:

Banks v. *O'Grady*, 113 F. 2d 926	8
Hayden v. *Warden*, 124 F. 2d 514	6
Johnston v. *Wright*, 137 F. 2d 914	6, 7
Matthews v. *Swope*, 111 F. 2d 697	5
McNealy v. *Johnston*, 100 F. 2d 280	5
Morse v. *United States*, 267 U. S. 80	8
Ponzi v. *Fessenden*, 258 U. S. 254	8, 9
Stamphill v. *Johnston*, 136 F. 2d 291, certiorari denied, 320 U. S. 766	8
Stamphill v. *United States*, 135 F. 2d 177	8
United States v. *Daugherty*, 269 U. S. 360	5
Wall v. *Hudspeth*, 108 F. 2d 865	5, 6, 8
Wright, In Re, 51 F. Supp. 639, affirmed, 137 F. 2d 914	7

Statute:

California Penal Code:

Sec. 3052	9
Sec. 3053	9

672967—45

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 515

JAMES F. KIRK, PETITIONER

v.

P. J. SQUIER, WARDEN, UNITED STATES PENITENTIARY, McNEIL ISLAND, WASHINGTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 33–47) is reported at 150 F. 2d 3.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 1, 1945 (R. 47), and a petition for a rehearing was denied July 24, 1945 (R. 48). The petition for a writ of certiorari was filed October 16, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Petitioner's federal sentence provided that it should begin to run upon his release from the imprisonment he was then serving under a life sentence imposed in a California state court "with possibility of parole." After serving some time on his state sentence, petitioner was paroled into the custody of the federal authorities. The question is whether his imprisonment under the federal sentence is valid.

STATEMENT

On May 15, 1934, petitioner pleaded guilty to a charge of kidnapping in the Superior Court of the State of California for the County of Los Angeles and was sentenced to life imprisonment "with possibility of parole" (R. 3, 8). Thereafter, petitioner was tried in the United States District Court for the Southern District of California for violations of the postal laws and conspiracy, and upon conviction he was sentenced on May 31, 1934, to imprisonment in a federal penitentiary for a total of thirty-seven years "to commence to run upon the release of the said defendants [petitioner and two others] from the imprisonment they are now serving under the judgment and sentence of the State of California" (R. 9–11; see also R. 4–5, 13–14, 20–24).

Petitioner was held in imprisonment by the State of California until November 1942. At that time he appeared before the State Board of

Prison Terms and Paroles upon an application for parole, and the Board thereupon paroled him into the custody of the federal authorities. Petitioner's parole by its terms was to become effective when he was taken into custody by the United States authorities, and it was a condition of the parole that in the event the federal authorities failed to incarcerate him for the duration of the period of his parole, he should immedately report to the State Parole Officer and be governed by his instructions, the Parole Officer being authorized to return petitioner to prison to await the further order of the Board if he deemed such action to be proper. (R. 5, 11–12.) Petitioner was taken into custody by the federal authorities at the State prison on November 30, 1942, and he was thereafter incarcerated in the McNeil Island Penitentiary under the judgment of conviction rendered by the District Court for the Southern District of California (R. 5–6, 15).

On August 30, 1944, petitioner filed an application for a writ of habeas corpus in the District Court for the Western District of Washington in which, after setting forth the facts as outlined above, he alleged that at all times after May 15, 1934, he had been and was a prisoner of the State of California; that under California law his parole did not release him from imprisonment under the sentence imposed by the Superior Court for the County of Los Angeles; and that his federal sen-

tence had not become effective (R. 2–15). A rule to show cause was issued (R. 16), and respondent filed a demurrer to the petition (R. 17). After a hearing, the demurrer was sustained and the petition for a writ of habeas corpus dismissed (R. 18–19). On appeal to the Circuit Court of Appeals for the Ninth Circuit, the order of the district court was affirmed (R. 47).

ARGUMENT

Petitioner contends that his state parole constitutes imprisonment and therefore his federal sentence could not by its terms become effective until he is released from parole under his California sentence (Br. 3, 5–11); and that any construction of the federal sentence which would enable it to become effective upon his release from confinement by the State would render the sentence so indefinite and uncertain as to be invalid (Br. 4–5, 14–17). The circuit court of appeals held that the federal district court clearly intended to make the federal sentence commence to run "if and when Kirk was released from physical confinement in state prison by parole, commutation or pardon" (R. 35–36). Such a holding is manifestly correct. At the time the federal sentence was imposed the court was aware that petitioner was confined in the California state prison serving a life sentence with possibility of parole. Under these circumstances, the

only time at which the federal sentence could become effective was upon petitioner's release from confinement through parole or executive clemency by the state authorities. Accordingly, the federal sentence was framed so as to begin upon the happening of the only event which would permit of his service of the federal sentence, i. e., release from actual imprisonment. The words "release from imprisonment" under these circumstances need only be accorded their natural and usual connotation, which is, "freedom from physical confinement." Hence, the California and federal cases cited by petitioner (Br. 6–10), which hold that a paroled convict is in the legal custody and control of the prison officials or parole authorities, furnish no support whatever for his argument that the condition of the commencement of his federal sentence had not occurred.

The federal sentence complies with the principle announced by this Court that sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them, but that the elimination of every possible doubt is not required. *United States* v. *Daugherty,* 269 U. S. 360, 363. See also *Matthews* v. *Swope,* 111 F. 2d 697, 699 (C. C. A. 9); *Wall* v. *Hudspeth,* 108 F. 2d 865 (C. C. A. 10); *McNealy* v. *Johnston,* 100 F. 2d 280, 282 (C. C. A. 9). Ap-

plying this principle here, it is clear that petitioner's sentence is not vague or indefinite. The state sentence which it was to follow was clearly identified and its terms ascertainable, and the event, the happening of which would awaken the federal sentence from its dormant condition, was described with such particularity as to set it apart from all other occurrences. Thus, the sentence is not to begin at some future time which could not be recognized with any degree of certainty, but is to commence at a time which, although indefinite, is capable of exact ascertainment by reference to the happening of a specific event. Sentences imposed by the federal courts may provide that they shall take effect upon the release of the defendant from service of a sentence imposed by a state court, and are valid even though the state sentence is an indefinite or indeterminate one. *Hayden* v. *Warden,* 124 F. 2d 514 (C. C. A. 9); *Wall* v. *Hudspeth,* 108 F. 2d 865 (C. C. A. 10).

As the circuit court of appeals pointed out (R. 40–42), there is no conflict between its decision in the instant case and its decision in *Johnston* v. *Wright,* 137 F. 2d 914 (C. C. A. 9), for the reason that the sentence in the latter case was conditioned to begin upon the expiration of the state sentence which Wright was serving, an event which had not occurred, whereas petitioner's sentence was

to commence upon his release from state imprisonment.[1]

Petitioner also contends that the State of California never legally consented to the transfer of his custody to the federal authorities (Br. 3–4, 11–14). Such an argument ignores the accepted

[1] In this connection, petitioner relies heavily (Br. 14–17) upon an excerpt from the opinion of Circuit Judge Denman, sitting as the habeas corpus court in the *Wright* case, in which Judge Denman expressed the view that even if Wright's federal sentence were construed to become effective upon his release from confinement under an Illinois sentence, as the respondent contended, the former would be void for uncertainty, because, in view of the Illinois indeterminate sentence and parole laws, it was not certain at the time the sentence was imposed that if Wright were to be paroled by the Illinois authorities, they would agree to surrender their custody during parole and turn him over to the United States (51 F. Supp. 639, 642–643 (N. D. Cal.)). Regardless of the validity of Judge Denman's reasoning in this respect (see authorities cited in the text, p. 6), his precise holding was that Wright's federal sentence was to begin "at the termination of the whole Illinois sentence, not at its first penitentiary period" (51 F. Supp. at 643); that, as so construed, the sentence was not void for uncertainty as to the date of its commencement (p. 644); and that since Wright had only been released from confinement under his Illinois sentence on parole and the sentence had not been terminated by the Illinois authorities in the manner prescribed by the state law, his federal sentence had not become effective, and his confinement thereunder was therefore unlawful (pp. 643–644). The decision of the Circuit Court of Appeals for the Ninth Circuit affirming Judge Denman's order releasing Wright from federal imprisonment was posited solely upon the basis that Wright's Illinois sentence had not expired, which was by the very terms of the federal sentence a condition precedent to its commencement (137 F. 2d at 916–917).

rule that if federal custody were in derogation of the prior right of California, the right to his custody is one that can be asserted only by the State. *Morse* v. *United States,* 267 U. S. 80, 81–82; *Ponzi* v. *Fessenden,* 258 U. S. 254, 260; *Wall* v. *Hudspeth,* 108 F. 2d 865, 866 (C. C. A. 10). Petitioner, being subject to punishment by both sovereignties, has no standing to demand that the State sentence, on which he has been paroled, be served first. *Stamphill* v. *United States,* 135 F. 2d 177, 178 (C. C. A. 10); *Banks* v. *O'Grady,* 113 F. 2d 926, 927 (C. C. A. 8). Nor could he complain, even if the federal authorities improperly obtained his custody in deprivation of the rights of the State. *Stamphill* v. *Johnston,* 136 F. 2d 291, 292 (C. C. A. 9), certiorari denied, 320 U. S. 766.

Moreover, if the State's consent must be found, we need not look further than the terms of the parole granted petitioner by the State of California. His parole, by its own terms, became effective only when he was taken into custody by the federal authorities, and it was a condition thereof that, if the federal government failed to incarcerate him for the duration of the period of parole, he should report to the State parole officer who was given authority in his discretion to return him to the state prison (R. 11–12). Thus the instrument by which petitioner was paroled

plainly consents to his custody by federal authorities and confinement in a federal penal institution.[2]

California, having determined to turn the custody of petitioner over to the federal government, was clearly permitted to do so under the principle announced in *Ponzi* v. *Fessenden,* 258 U. S. 254. When it exercised that privilege and released petitioner from confinement in the state prison on parole into the custody of federal authorities, the federal sentence came into operation, thus permitting respondent to receive petitioner into his custody for the purpose of enforcing the federal judgment.

CONCLUSION

The decision below is correct, and the case presents no conflict of decisions or important question of law. For the reasons stated, we respectfully

---

[2] As the court below held (R. 44), there is no merit in petitioner's contention that the state parole board had no authority to parole him into the custody of the federal authorities. The parole board is expressly empowered by the California Penal Code, the pertinent provisions of which are copied in the appendix to the petition for certiorari, to establish rules and regulations under which state prisoners may be allowed to go upon parole (§ 3052) and to impose on a parolee such conditions as it may deem proper (§ 3053).

submit that the petition for a writ of certiorari should be denied.

J. HOWARD MCGRATH,
Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
JAMES W. KNAPP,
Attorneys.

NOVEMBER 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945